

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN**

**DAVID KRAUSE,
Petitioner,**

v.

Case No. 05C957

**MICHAEL THURMER,
Respondent.**

ORDER

On May 8, 2007, habeas petitioner David Krause filed a motion for reconsideration of my order denying his petition. One day later, petitioner filed a notice of appeal of my dismissal of his case and requested a certificate of appealability. On May 14, 2007, I denied petitioner a certificate of appealability but neglected to address his motion for reconsideration. Before me is petitioner's motion for reconsideration, in which petitioner asserts that I made a manifest error of law.

Petitioner claims that he was denied due process because he did not receive a properly-worded instruction on imperfect self-defense. The state court of appeals found that petitioner had never been entitled to an instruction on imperfect self-defense, and thus the erroneous instruction did not affect his trial. I found that the court of appeals's state law determination as to petitioner's entitlement to the instruction was unreviewable in a habeas petition except to the extent that it itself violated due process. I found that the court of appeals's decision did not violate due process. In his motion for reconsideration, petitioner argues that he was entitled to a correct recitation of any jury instruction, whether he was actually entitled to such instruction or not. In order to show a federal constitutional violation resulting from an error in state law, petitioner must show that the flawed instruction infected the entire trial such that it rendered the

trial fundamentally unfair. See Estelle v. McGuire, 502 U.S. 62, 71-72 (1990). Essentially, this test is all about prejudice – whether an error infected a defendant’s trial with prejudice against him. In this case, the trial court’s error may have made it less likely that the jury would convict petitioner of second-degree homicide via imperfect self defense. However, petitioner was not entitled to an instruction on second-degree homicide via imperfect self defense, and there is no evidence that the error made is more likely that the jury would convict petitioner of first-degree homicide rather than the only proper affirmative defense – accident. As such, the error did not prejudice petitioner at all, much less rise to the level of a due process violation.

Thus,

IT IS ORDERED that petitioner’s motion for reconsideration is **DENIED**.

Dated at Milwaukee, Wisconsin, this 17 day of May, 2007.

/s _____
LYNN ADELMAN
District Judge